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CHARLES ELMORE
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. 81

THE ALTON RAILROAD COMPANY, A CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

BRIEF ON BEHALF OF APPELLANT.

SILAS H. STRAWN,
FRANK H. TOWNER,
Solicitors for Appellant.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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BRIEF ON BEHALF OF APPELLANT.

MAY IT PLEASE THE COURT:

This case comes to this court on appeal from an order of the District Court for the Northern District of Illinois, Eastern Division, dismissing the petition of appellant for lack of jurisdiction. The action is one by appellant to set aside that part of an order made by the Interstate Commerce Commission (hereinafter called the "Commission"), in which the Commission refused to require a change in the divisions of certain joint rates. The defendants are The United States of America, the Commission and thirty eastern railroads (hereinafter called the "Railroad Defendants") which joined with appellant in the publication of the joint rates involved.

1. Reference to Official Report of Opinion of Lower Court and to Reports and Orders of the Interstate Commerce Commission.

The opinion of the lower court in this case is officially reported at 58 Fed. (2d) 399, and appears in the printed record at pages 177 to 184, inclusive. The lower court also made twelve findings of fact and stated three conclusions of law which appear at pages 173 to 177 of the printed record.

Two reports were made by the Commission in the proceedings before it, the case being entitled "William W. Wheelock and William G. Bierd, Receivers, etc. *vs.* Akron, Canton & Youngstown R. Co., *et al.*, Docket No. 22487." The first one, dated November 28, 1930, is reported at 169 I. C. C. 594, and was accompanied by an order, not officially reported, which granted the relief sought. This report and order appears at pages 22 to 40, inclusive, of the printed record. The second report of the Commission is reported at 179 I. C. C. 517, and was also accompanied by an order which is not officially reported. This report and order appears at pages 41 to 56, inclusive, of the printed record. The order itself, part of which is attacked herein, appears at pages 50 to 56, inclusive, of the printed record.

2. Statement of the Case.

The facts appearing in the record made before the Commission are reviewed in the two reports of the Commission and may be briefly stated. By tariff publication, the grain-producing territory west of the Peoria-Pekin district and Chicago, Illinois, is divided into four groups known as Trans-Mississippi River, Northern Iowa, Illinois-Iowa, and Northwestern territories (R. 87). These groups are outlined on Exhibit 14 before the Commis-

sion (R. 90). Shipments of grain, grain products and grain by-products move from these territories to Peoria-Pekin or Chicago upon either local or proportional rates, published by the carriers operating west of Peoria-Pekin and Chicago, and which collect and retain all the revenue accruing thereunder (R. 93, 104, 105).

The transportation of shipments consigned to Peoria-Pekin is completed by the unloading of the cars and the payment of the charges. The commodities go into elevators and may be sold and resold; may be used in Peoria; may be manufactured into other commodities and thereafter be used in Peoria or shipped elsewhere. The identity of the shipments is not preserved and a subsequent outbound shipment of grain or its products may not be the same shipment that moved inbound (R. 93, 94).

When an outbound shipment of grain, grain products or grain by-products is made from Peoria-Pekin to destinations east of Buffalo, New York, the shipper can secure the application of a "reshipping" or "proportional" rate if he surrenders billing showing that within the preceding twelve months, an equivalent weight of grain, its products or by-products, moved inbound to Peoria-Pekin from one of the territories west thereof (R. 94). The amounts of the outbound "reshipping" rates vary, dependent upon the territory from which the inbound shipment, covered by the surrendered billing, moved. Thus, if that billing covered a grain shipment from Trans-Mississippi River territory to Peoria-Pekin, the outbound grain "reshipping" rate would be 32 cents per hundred pounds. If it covered a grain shipment from Northern Iowa territory to Peoria-Pekin, the outbound grain "reshipping" rate would be 30.5 cents per hundred pounds. If it covered a grain shipment from Northwestern territory to Peoria-Pekin, the outbound

grain "reshipping" rate would be 30 cents per hundred pounds (R. 102-103).

If an outbound shipment of grain, its products or by-products, from Peoria-Pekin to eastern destinations is not accompanied by the surrender of billing showing an inbound shipment to Peoria-Pekin within the preceding twelve months, the applicable outbound rate is known as a "local" rate, and is uniformly higher than any of the "reshipping" rates (R. 88). The names of the two kinds of rates have no significance. The same transportation service is performed east of Peoria-Pekin under both the "local" and "reshipping" rates, and they differ only in amount (R. 94). Only their application is determined by the surrender of inbound billing.

Both kinds of rates are joint rates, published by agreement between appellant and its predecessors and the Railroad Defendants, and have been in effect for many years (R. 120). They have always been and are now published and filed with the Commission as required by Section 6 of the Act to Regulate Commerce (U. S. C. A., Title 49, Sec. 1 to 15a, p. 281), being shown in Exhibit 1 before the Commission (R. 82). The service performed by appellant and its predecessors under these joint rates from Peoria-Pekin to eastern destinations consists of originating the shipments at Peoria-Pekin, hauling them to Dwight, Joliet or Chicago, Illinois, and there delivering them to one of the Railroad Defendants for further transportation (See Ex. 15 before Commission; certified to this court, R. 90).

Another circumstance should be mentioned since it was principally relied on by the defendants in the proceedings before the Commission. The through rates, composed of the local or proportional rates to Peoria-Pekin or Chicago plus the "reshipping" rates to the east, from any point in the territories west of Chicago and Peoria-

Pekin to any point in eastern territory are equalized via both Peoria-Pekin and Chicago (R. 119, 120). This parity of rates is maintained for competitive reasons.

These through rates, however, are not joint rates, the separate rates to and from the junctions varying in amount. In some cases, the rates to Peoria-Pekin and Chicago are the same, and in these cases, the "reshipping" rates to the east are the same from both points. In some cases, the rates to Chicago are 1/2 cent per hundred pounds higher than the rates to Peoria-Pekin, and in these cases the "reshipping" rates from Peoria-Pekin are 1/2 cent per hundred pounds higher than the "reshipping" rates from Chicago. In other cases, the rates to Chicago are 2 cents per hundred pounds higher than the rates to Peoria-Pekin, and in these cases the "reshipping" rates from Peoria-Pekin are 2 cents per hundred pounds higher than the "reshipping" rates from Chicago.

Thus, for example, a shipment from Goodland, Kansas, to New York, via Chicago, would move on a through rate of 65 cents, made up of a rate of 34.5 cents to Chicago and a "reshipping" rate from Chicago of 30.5 cents. A shipment from Goodland moving to New York via Peoria, would also move on a through rate of 65 cents, made up of a rate of 32.5 cents to Peoria and a "reshipping" rate of 32.5 cents from Peoria to New York. The essential fact, however, is that the "local" and "reshipping" rates from Peoria-Pekin to the east are joint rates, published by appellant and the Railroad Defendants.

Until July 1, 1928, the divisions of these joint "local" and "reshipping" rates from Peoria-Pekin to eastern destinations, as between appellant and its predecessors and the Railroad Defendants herein, were agreed upon and were presumably satisfactory. On July 1, 1928, the

Railroad Defendants, over the objection and protest of the Receivers of The Chicago and Alton Railroad Company, predecessors of appellant (R. 86), established new divisions of the joint "reshipping" rates, reducing the proportion allowed the Receivers to nothing in many cases and to a maximum of 2 cents per hundred pounds in other cases.

This reduction was accomplished by the statement of the Railroad Defendants, that on traffic from Peoria-Pekin, moving under the joint "reshipping" rates, they would take the amount of their "reshipping" rate applying on similar traffic from Chicago to the same eastern destinations (R. 96-98). The Railroad Defendants also published new division sheets, effective July 1, 1928, and February 1, 1929 (Ex. 4 and 5 before Commission, R. 85) putting the new divisions into effect. Neither appellant nor its predecessors, the Receivers, were parties to these division sheets or consented to their issuance, nor were they authorized by any decision of the Commission or of any court (R. 86).

In many cases, the "reshipping" rate from Chicago was the same as that from Peoria-Pekin, which left the Receivers nothing for their service. In no case was the "reshipping" rate from Chicago more than 2 cents per hundred pounds less than the corresponding rate from Peoria-Pekin, so that the maximum earnings of the Receivers on any shipment amounted to 2 cents per hundred pounds. Exhibit 15 before the Commission shows that the earnings thus left to the Receivers were in most cases insufficient to pay even their switching absorptions on the traffic, to say nothing of other costs of transportation (R. 90-92). The Railroad Defendants were able to enforce these divisions upon the Receivers because all of the traffic moves eastbound from Peoria-Pekin and the freight charges are collected by them and other eastern lines.

After vainly endeavoring to secure a revision of the divisions thus established by the Railroad Defendants (R. 96-99), the Receivers of The Chicago and Alton Railroad Company filed with the Commission, on June 21, 1929 (R. 23), a petition alleging that those divisions were unlawful, in violation of Paragraph 4 of Section 1 of the Act to Regulate Commerce (U. S. C. A., Title 49, Sec. 1 to 15a, p. 52) and Section 208 (b), Transportation Act, 1920 (U. S. C. A., Title 49, Sec. 16 to end, p. 382), and asking that the Commission fix the proper divisions of the joint rates in question. This petition appears at pages 13 to 22 of the printed record, and only put in issue the propriety of the divisions between the Receivers and the Railroad Defendants of the joint "local" and "reshipping" rates applying from Peoria and Pekin to eastern destinations.

After hearing, Division 5 of the Commission issued the first report and order (R. 22-40). In this report, the contentions of the Receivers were upheld and the order required that proper divisions of the joint rates involved be made effective on or before March 10, 1931. This report, together with the dissenting opinion of Commissioner Porter (R. 33, *et seq.*), contains not only a full statement of the facts upon which Division 5 based its conclusion, but also those facts relied upon by the Railroad Defendants in defense of the divisions which had been arbitrarily established by them. Before the order thus entered became effective, the Railroad Defendants filed with the Commission a petition for rehearing and postponement of the order, which petition was granted and a rehearing had (R. 152, 153). During the interim between the first and second hearings, an effort was made by the Railroad Defendants to cancel some of the joint "reshipping" rates from Peoria-Pekin to the east. The Commission suspended the cancelling tariff upon

protest of some of the grain interests, and when the matter was called for hearing, the cancelling tariff was voluntarily withdrawn (R. 167).

Upon the submission of the case on rehearing, a majority of the entire Commission issued a second report (R. 41, *et seq.*) and order (R. 50 *et seq.*). In this second report and order, the previous action of Division 5 in requiring a revision of the divisions of the joint "local" rates was upheld and the eastern lines, including the Railroad Defendants, were required to establish the divisions prescribed by the Commission on or before January 16, 1932. That part of the order has been complied with and is not here in isuse. With respect to the divisions of the joint "reshipping" rates, however, a majority of the entire Commission reversed the action of Division 5, saying (R. 48):

> "We find that the assailed divisions of the reshipping or proportional rates have not been shown to be unjust, unreasonable, or otherwise unlawful as alleged, and the finding in the original report in that respect is reversed."

So far as may be judged from the language of the second report, this conclusion was reached after a consideration of transit at Peoria-Pekin and the alleged connection between the inbound and outbound movements of the traffic involved; because of the alleged circuity of the route from some of the western originating territory, via Peoria, to eastern destinations, and because an increase in the Receivers' divisions would have reduced the earnings of the Railroad Defendants to amounts less than their "reshipping" rates from Chicago.

By the order which accompanied this report, the original report and order of Division 5 and the report on rehearing are made a part of the order (R. 55); the original order of Division 5 is vacated; and there is a recital of the finding that (R. 56)

"the present divisions of joint reshipping or propor-

> tional rates on grain, grain products and grain by-products, in carloads, from Peoria and Pekin over the lines of complainants to Chicago, Joliet or Dwight, destined to points in eastern trunk line and New England territories east of Buffalo, are not unjust, unreasonable, or otherwise unlawful as alleged by complainants."

This disposition of the case by the Commission had the result of leaving in effect those divisions previously established by the Railroad Defendants over the objection of the Receivers, and of leaving the Receivers in the position of being required to perform a transportation service under joint rates out of which they received from nothing to a maximum of 2 cents per hundred pounds; amounts less than the cost of service. The action of the Commission in making the second report and entering the second order was not unanimous. Commissioners Eastman, Brainerd, Farrell and Lewis dissented on the ground that the divisions of the "reshipping" rates thus approved, were not just, reasonable and equitable, but on the contrary, were unreasonable and unjust and operated to confiscate the property of the Receivers (R. 48-50).

Subsequent to the second report of the Commission, the property formerly operated by the Receivers of The Chicago and Alton Railroad Company was acquired at judicial sale by appellant (175 I. C. C. 301), and appellant succeeded to the rights of the Receivers (R. 173).

3. Proceedings in the Lower Court.

The petition herein was filed on January 16, 1932, the suit being started pursuant to the provisions of the Urgent Deficiency Appropriations Act of October 22, 1913 (U. S. C. A., Title 28, Sec. 170, pp. 652, 653, 656). The petition (R. 1-12), after setting out the facts, alleges that the final order of the Commission with respect to the

divisions of the "reshipping" rates from Peoria-Pekin, established by the Railroad Defendants, constitutes an approval of those divisions and authorizes their application by the Railroad Defendants in the future (R. 7); that the effect of this order is to require appellant to engage in interstate transportation for a return which confiscates its property and that this result is not justified by any evidence before the Commission and is unreasonable, arbitrary, unlawful, and violates appellant's constitutional rights (R. 7-8); that if the present divisions of the "reshipping" rates, allowed to appellant by the Railroad Defendants, were approved in an effort to force appellant to discontinue its participation in the handling of traffic thereunder, that part of the order is void because that was not an issue presented to the Commission for adjudication and there was no evidence in the record with respect to it (R. 8).

It was further alleged (R. 9) that the divisions of the "reshipping" rates established by the Railroad Defendants, were in violation of Paragraphs 208 (b) of the Transportation Act, 1920; that they operated to confiscate the property of appellant and that the only authority for their enforcement against appellant was the Commission's order of December 7, 1931; that appellant had a lawful right to handle traffic under the "reshipping" rates from Peoria-Pekin, but was unable to do so without having its property confiscated by an application of the divisions approved by the Commission (R. 10).

All defendants filed answers (R. 56 *et seq.*, 63 *et seq.*, 73 *et seq.*), generally alleging the validity of the Commission's order with respect to the divisions of the "reshipping" rates and further moving to dismiss appellant's petition on the ground that the Commission's order, in so far as it dealt with those divisions, was negative in form and substance; was not an order within the meaning of the Commerce Court Act (36 Stat. 539) or

the Urgent Deficiencies Act (38 Stat. 219); and that the lower court was without jurisdiction to issue the injunction prayed for.

Upon the hearing in the lower court, the entire record made before the Commission in its Docket 22487 was introduced in evidence as Exhibit 1 (R. 80). After final hearing, the lower court dismissed appellant's petition (R. 184, 185) for want of jurisdiction, holding (R. 184) that since the order attacked, in so far as it is complained of, did not command appellant to do or refrain from doing anything, did not grant or withhold any authority or privilege and did not abridge any power or facility, the court was without jurisdiction.

On this appeal, all of the oral evidence taken in the proceedings before the Commission has been reduced to narrative form (R. 81 *et seq.*), under a stipulation of the parties that such narrative is a true and correct statement in narrative form of the oral testimony introduced in those proceedings and that it sets forth in condensed form all oral testimony offered on the trial of the case and which is essential to the decision of the questions presented by the appeal (R. 192, 193). All of the exhibits offered in the proceedings before the Commission, and which were included as a part of Exhibit 1 in the lower court, have been certified to this court as original exhibits (R. 191) and are on deposit with the clerk.

4. Proceedings in This Court.

In accordance with Paragraph 1 of Rule 12 of the Revised Rules of this court, a statement of the grounds upon which the jursidiction of this court is invoked was duly filed by appellant and it subsequently also filed a motion to advance the case for hearing. On May 31, 1932, this court entered an order finding that probable jurisdiction had been shown and advancing the case and setting it for hearing on October 10, 1932, after the cases theretofore assigned for that day.

SPECIFICATION OF ERRORS.

Appellant makes the following specification of errors:

(1) The lower court erred in finding that appellant made no complaint with respect to the only affirmative part of the order of the Interstate Commerce Commission dated December 7, 1931; in finding that said order contains no requirements in respect of the divisions of the so-called joint reshipping or transit rates from Peoria-Pekin to eastern destinations; in finding that said order places no compulsion upon appellant with respect to the divisions of said rates or with respect to the rates or the routes over which they apply; in finding that said order, in so far as it relates to the divisions of said rates, is negative in form and in substance; in finding that it had no jurisdiction to issue an injunction enjoining, vacating, annulling and setting aside so much of the said order as approves and authorizes the application of the present divisions of said rates and enjoining the Railroad Defendants from continuing to apply and enforce said divisions of said rates; and in finding that the petition herein should be dismissed for want of jurisdiction.

(2) The lower court erred in failing to find, as it should have done, that said order of the Interstate Commerce Commission, dated December 7, 1931, in so far as it relates to the present divisions of the so-called joint transit or reshipping rates, is unreasonable, arbitrary and void; in failing to find, as it should have done, that said part of said order is not supported by any evidence introduced in the proceedings before said Commission; in failing to find, as it should have done, that said evidence did not justify said order in so far as it relates to the divisions of said rates; in failing to find, as it

should have done, that said order, in so far as it relates to the divisions of said rates, is affirmative in form and substance and authorizes and approves divisions which operate to confiscate the property of appellant in violation of its constitutional rights; in failing to enjoin, vacate, annul and set aside so much of said order as authorizes and approves the application by the Railroad Defendants of the present divisions of said rates; and in failing to enjoin the Railroad Defendants herein from continuing to apply and enforce said divisions.

SUMMARY OF ARGUMENT.

I.

That part of the order of the Commission here assailed, dealing with the divisions of the joint "reshipping" rates from Peoria-Pekin to the east, is in form, a specific approval of divisions which are unlawful, and in substance, deprives appellant of its constitutional rights. The joint rates involved are published and filed with the Commission as required by law and so long as they remain in effect appellant is required to furnish a service under them. For this service it receives either no compensation or a compensation insufficient to pay its cost of service, all with the approval and authority of the Commission.

II.

The Commission does not have unlimited power to deal with divisions. On the contrary, the law imposes upon that body the duty and obligation of fixing just, reasonable and non-confiscatory divisions of joint rates as between the carriers parties thereto. Any order made by it with respect to divisions will be enjoined if it is unreasonable, arbitrary, not supported by the record or produces a violation of constitutional rights. The Commission has failed to discharge its duty in this case, since it has approved and authorized divisions which are unjust and unreasonable on their face and which produce a confiscation of appellant's property.

III.

The petition filed herein does not require the court in the exercise of its jurisdiction to usurp any administrative function of the Commission. It only prays for an injunction annulling the approval and authority conferred by the Commission upon divisions which operate to confiscate appellant's property, and for an injunction restraining the application of those divisions by the Railroad Defendants herein. Had the court taken jurisdiction, it would have been required to do no more than was necessary to preserve appellant's rights, leaving the Commission free, in the exercise of its jurisdiction and upon a consideration of the record, to fix those divisions which would be proper as between the carriers, parties to the joint rates involved.

IV.

In determining whether or not an order of the Commission is justiciable, the test is whether or not the taking of jurisdiction by a court will require the court to usurp a function of the Commission and substitute its judgment upon an administrative question for that of the Commission. This is the rule established by the decisions of this court, since if a court is permitted to substitute its judgment for that of the Commission with respect to such a matter, the result would be to destroy that uniformity sought to be accomplished by the law. This is not the situation in the case at bar, for the taking of jurisdiction here does not require the court to exercise any power conferred upon the Commission. The court is only requested to protect appellant in those rights granted to it by statute and guaranteed to it under the federal constitution and had jurisdiction to do so.

V.

On the merits, the Commission's order with respect to the divisions of the "reshipping" rates here involved cannot be sustained since those divisions deprive appellant of its statutory and constitutional rights, and are unjust and unreasonable on their face. There is no evidence in the record of the proceedings before the Commission which supports the Commission's conclusion with respect to those divisions. In reaching that conclusion, the Commission failed and refused to fulfill its statutory duty; based its conclusion upon matters not in issue and concerning which there had been no adequate hearing; misconstrued and misapplied the law and determined issues not before it under the pleadings. Its order in that respect should therefore be annulled, and the Railroad Defendants enjoined from enforcing the divisions approved by it.

ARGUMENT.

I.

THAT PART OF THE COMMISSION'S ORDER DEALING WITH THE DIVISIONS OF THE JOINT RESHIPPING RATES FROM PEORIA-PEKIN TO THE EAST IS NOT NEGATIVE IN FORM OR SUBSTANCE. IN FORM, IT IS A SPECIFIC APPROVAL OF DIVISIONS WHICH ARE UNLAWFUL, AND IN SUBSTANCE, IT DEPRIVES APPELLANT OF ITS CONSTITUTIONAL RIGHTS. SINCE THE TAKING OF JURISDICTION BY A COURT WOULD NOT REQUIRE THE EXERCISE BY THE COURT OF AN ADMINISTRATIVE FUNCTION CONFERRED UPON THE COMMISSION, THAT PART OF THE ORDER HEREIN ATTACKED IS JUSTICIABLE.

Appellant's bill in this case was dismissed upon the sole ground that the lower court did not have jurisdiction (R. 184, 185). It was held that so much of the Commission's order as dealt with the divisions of the so-called joint "reshipping" rates was negative both in form and in substance and that for this reason no injunction could be granted. This question of jurisdiction, therefore, lies at the threshold of the case. It has been passed upon by this court many times and, we submit, the action of the lower court was based upon an erroneous view of what this court has held. As a preliminary to a consideration of this legal question, we call the court's attention to certain other circumstances.

A. *The present divisions of the joint "reshipping" rates are violative of appellant's rights under the law.*

As we have said, the present divisions of the joint "reshipping" rates from Peoria-Pekin to the east, allowed to appellant by the Railroad Defendants, are shown by Exhibit 15 before the Commission (R. 90-92)

to be insufficient in most cases to even pay the switching absorptions made by appellant. On much of the traffic appellant receives nothing for its service, and as said by Commissioner Eastman (R. 49), the confiscatory character of a zero division is surely not open to argument. On all other traffic, the earnings of appellant range from ½ cent per hundred pounds to 2 cents per hundred pounds, amounts which in no case pay appellant's cost of operation. Because they collect the money, the Railroad Defendants are able to impose these divisions upon appellant.

Section 1 (4) of the Act to Regulate Commerce (U. S. C. A. Title 49, Sec. 1 to 15a, p. 52) provides:

> "It shall be the duty of every common carrier subject to this Act, engaged in the transportation of passengers or property, to provide and furnish such transportation upon reasonable request therefor * * * and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers."

Thus, a positive duty is imposed upon the Railroad Defendants with respect to the divisions of the joint reshipping rates here involved. It is true that the Commission is given primary jurisdiction to determine what is just, reasonable and equitable, *Terminal Railroad Association* v. *United States,* 266 U. S. 17, 31, but this jurisdiction does not confer upon the Commission the right to fix divisions which are confiscatory. In *L. & P. B. Ry. Co.* v. *United States,* 257 U. S. 114, 117, and *New England Divisions Case,* 261 U. S. 184, 194, both of which cases involved division orders of the Commission, the issue of confiscation was not passed on. In *United States* v. *A. & S. Ry. Co.,* 265 U. S. 274, another case involving a divisions order of the Commission, the rule was stated at pages 284 and 285, where it was said:

> "It is settled that in determining what the divi-

sions should be, the Commission may, in the public interest, take into consideration the financial needs of a weaker road; and that it may be given a division larger than justice merely as between the parties would suggest 'in order to maintain it in effective operation as part of an adequate transportation system,' provided the share left to its connections is 'adequate to avoid a confiscatory result.' *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 477; *New England Divisions Case,* 261 U. S. 184, 194, 195."

The right of a carrier to receive non-confiscatory divisions of joint rates was again recognized in *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U. S. 74, where it was said at pages 88 and 89:

"Appellant's claim that the Commission's order, if enforced, will operate to deprive them of their property without due process of law in violation of the Fifth Amendment to the Constitution. It is well established by decisions of this court that, in order to invoke such constitutional protection, the facts relied upon to prevent enforcement of rates prescribed by governmental authority must be specifically alleged and from them it must clearly appear that the enforcement of the measure complained of will necessarily deny to the utility the just compensation safeguarded to it by the Constitution. *Aetna Ins. Co.* v. *Hyde,* 275 U. S. 440, 447-8 and cases cited. Here the joint rates themselves are not assailed as too low, but the claim is that the prescribed divisions are confiscatory. The same rules as to pleading and proof apply to orders prescribing divisions as to laws fixing rates. There is no allegation in the complaint, or evidence in the record to show that any division to any of the appellants will not yield operating expenses chargeable to the service covered by it plus a reasonable return on property value fairly attributable to that service. There is no foundation in the record for the contention."

Certainly, the right of a carrier to receive non-confiscatory divisions is as certain as its right to receive non-confiscatory rates for service performed by it, and the

latter right has been repeatedly recognized by this court. *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 595, 604; *Northern Pacific Ry. Co.* v. *Department, etc.,* 268 U. S. 39, 43, 44, 45; *Chicago, etc. Ry. Co.* v. *Utilities Commission,* 274 U. S. 344, 350, 351.

It follows from the foregoing that the divisions of the joint "reshipping" rates from Peoria to the east, imposed upon appellant by the Railroad Defendants, are unjust, unreasonable and inequitable and violate appellant's rights under the statute and the Fifth Amendment to the Constitution; and that prescription or approval of such divisions by the Commission adds nothing to their validity. As a matter of law, these divisions were promulgated in violation of law. They constituted a change in divisions effective on February 29, 1920, and were made effective by the Railroad Defendants without agreement of appellant or its predecessors and without the approval of any court or commission having jurisdiction (R. 86), in violation of Section 208 (b), Transportation Act, 1920 (U. S. C. A. Title 49, Sec. 16 to end, p. 382) which reads as follows:

> "All divisions of joint rates, fares or charges, which on February 29, 1920 are in effect between the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by mutual agreement between the interested carriers, or by state or federal authorities, respectively."

B. *The petition filed herein does not require the court to substitute its judgment for that of the Commission with respect to an administrative matter committed to the Commission by law.*

As we have said, the Commission has primary exclusive jurisdiction to fix the amount of the just and reasonable divisions required by Section 1 (4) of the Act to Regulate Commerce, *Terminal R. R. Ass'n.* v. *United States,*

266 U. S. 17, 31, upon a consideration of those factors enumerated in Section 15 (6) of the Act. *New England Divisions Case,* 261 U. S. 184, 194; *United States* v. *A. & S. Ry. Co.,* 265 U. S. 274, 284; *Brimstone R. R. Co.* v. *United States,* 276 U. S. 104, 116, 117; *B. & O. R. R. Co.* v. *United States,* 277 U. S. 291, 300, 301; *B. S. L. & W. Ry. Co.* v. *United States,* 282 U. S. 74, 82. A court has no power to substitute its judgment for that of the Commission in such a manner. *United States* v. *New River Co.,* 265 U. S. 533, 542; *G. N. Ry. Co.* v. *Elevator Co.,* 259 U. S. 285, 291, 292.

But in this case, the court was not asked to substitute its judgment for that of the Commission, nor to say what divisions would be just and reasonable and should be made effective. After setting out the facts and making various allegations, the prayer of the petition is (R. 12) that after final hearing the order of the Commission made on December 7, 1931, in so far as it is complained of, be enjoined, set aside and annulled, and that the Railroad Defendants be enjoined from enforcing or applying against appellant the divisions of the joint "reshipping" rates approved by the Commission. This prayer did not require the court to say what the divisions of the "reshipping" rates should be, or to usurp any administrative function of the Commission. If granted, it only required the annulling of an approval of divisions which must be conceded to be unlawful, and the preventing of their use by the Railroad Defendants under cover of that approval.

C. *The Commission was under a definite obligation to fix just and reasonable divisions of the joint rates here involved.*

Sections 1 (4) and 15 (6) were added to the Act to Regulate Commerce by the Transportation Act 1920 (41 Stat. 474, 486; U. S. C. A. Title 49, Sec. 1 to 15a, pp. 52,

426). Thus, in 1920 for the first time there was placed upon carriers and the Commission a definite obligation with respect to divisions of joint rates. The general purposes of the Transportation Act, 1920, have been announced by this court many times. In *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, this court briefly reviewed the act and said at page 585:

> "It is manifest from this very condensed recital that the act made a new departure. * * * The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in Sec. 15a to be one of the purposes of the bill."

And at page 589 it was said:

> "Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonably compensatory return for all the work it does."

In *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, this court discussed the Transportation Act, 1920, saying at page 478:

> "The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.
>
> * * * * *

> To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety."

The rights and duties of the Commission under the Transportation Act, 1920, with respect to the divisions of joint rates, have also been discussed by this court. In *New England Divisions Case, supra,* at pages 189 and 190, it was said:

> "Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission, new powers were conferred and new duties imposed."

In the same case, after discussing the varied situation of the carriers, it was said at page 191:

> "It was necessary to avoid unduly burdensome rate increases and yet secure revenue adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted: the group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections. * * * The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the

new rate-fixing sections. It was, indeed, indispensable."

Again, in approving the method followed by the Commission in fixing the divisions there involved, this court said in the same case at page 199:

> "Congress did so provide, in effect, when it imposed upon the Commission the duty of determining the divisions."

In *B. S. L. & W. Ry. Co.* v. *United States, supra,* another case involving divisions, this court said at page 82:

> "The Commission by Section 15 (6) is required to consider the condition of each carrier and to determine whether the division of each joint rate is unreasonable or otherwise repugnant to the specified standards and what division will for the future be just, reasonable and equitable. *United States* v. *Abilene & So. Ry. Co.,* 265 U. S. 274, 291."

It follows that under the present law, the Commission had a very definite duty in this case. That duty was not discharged by the approval of divisions which are confiscatory. Nor may the Commission escape the obligation placed upon it by law by putting its disposition of the case before it in any particular form. Since the divisions left in effect by it must be conceded to be unjust, inequitable and confiscatory, it has denied to appellant rights secured to appellant by law and has failed to perform its definite duty. Any order producing such results must be condemned and is necessarily affirmative in effect, at least.

D. *The order in this case, in so far as it relates to the divisions of the joint "reshipping" rates from Peoria-Pekin to the East, is not a negative order under the decisions of this court.*

The decision of the lower court in this case was apparently based upon the theory that since the order of the Commission did not create the situation of which ap-

pellant complained but only dismissed its complaint in so far as the divisions of the joint "reshipping" rates were concerned, that order was therefore negative and could not be enjoined. We submit that the lower court thus adopted a false standard in determining whether or not the order was justiciable. Such a theory disregards the statutory right of appellant to receive just and non-confiscatory divisions, and the legal obligation of the Commission to establish such divisions. It adopts the outward form of the order as determining its legal status, in disregard of the effect produced by that order. It makes the court's jurisdiction depend entirely upon whether or not relief is denied to one party only, without regard to the results produced by such a denial and without regard to whether or not the taking of jurisdiction would require the court to exercise an administrative function of the Commission, which is, after all, the real test. No decision of this court supports such a theory, and many of the authorities cited in the opinion of the lower court as supporting its conclusion, really sustain the jurisdiction which that court denied.

In *Procter & Gamble* v. *United States,* 225 U. S. 282, it appeared that certain car demurrage rules had been put into effect by the railroads, which rules had application to privately owned cars standing upon tracks owned by the industries which owned the cars. The Procter & Gamble Company filed a complaint with the Commission attacking these rules. This court said at page 287:

> "After hearing, the Commission made a report declaring that the rules complained of were in no sense in conflict with the act to regulate commerce, and on the contrary conformed to that act and tended to prevent and repress unlawful preferences and discriminations. An award of relief was therefore denied."

The question at issue in this court was stated at page 292 of the opinion as follows:

> "In other words, the important question is, Is the

authority of the Commerce Court confined to enforcing or restraining, as the case may require, affirmative orders of the Commission, or has it the power to exert its own judgment by originally interpreting the administrative features of the act to regulate commerce and upon that assumption treat a refusal of the Commission to grant relief as an affirmative order and accordingly pass on its correctness?"

This court then dealt at length with the character of the authority conferred upon the Commission by the act creating it, concluding on page 297 by the statement,—

"that it was never considered that there was power in the courts as an original question without previous affirmative action by the Commission to deal with what might be termed in a broad sense the administrative features of the act to regulate commerce by determining as an original question that there had been a compliance or non-compliance with the provisions of the act."

The duty and jurisdiction of the courts was stated by this court in its opinion as follows, at pages 297 and 298:

"Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may be not technically doing so. *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 547; *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452."

It was, therefore, held (pp. 298, 299) that since the

taking of jurisdiction in that case would (a) create rights not previously in existence; (b) create divided authority on a matter where primary singleness of action was imperative; and (c) create contradiction and confusion which the law sought to avoid, the order attacked was not one of which the courts could take cognizance.

That case involved many considerations not present in the case at bar. There, the decision of the Commission was partly based, at least, upon the thought that the demurrage rules under attack operated to prevent violations of the law, and it was held by this court that the taking of jurisdiction would require the court to usurp an administrative function of the Commission. In this case there is no such situation. The *Procter & Gamble* decision supports appellant's position, for in this case, a violation of appellant's constitutional rights must be conceded; a want of conformity by the Commission to its statutory authority is obvious, and the power of the Commission has been so arbitrarily exercised as to not only transcend its authority, but to constitute a refusal to act in accordance with the obligation imposed upon it by law. In each and all of these circumstances, a court would have jurisdiction under authority of this court's decision in the *Procter & Gamble case, supra.* Certainly, there is no justification in that decision for the argument that an order of the Commission which in form denies relief to one party only is thus made incapable of being adjudicated in court. Nor do the later decisions of this court support such a theory.

In *Hooker* v. *Knapp,* 225 U. S. 302, the order sought to be enjoined was one in which the Commission had denied the entire reduction in rates claimed by complainant in a complaint filed with the Commission. The bill prayed that the Commission be required not only to annul its order but that the case be reopened and the complainants

given further relief (p. 305). The bill was dismissed on the authority of the *Procter & Gamble* decision.

In *Lehigh Valley Railroad* v. *United States,* 243 U. S. 412, the facts were that the railroad had filed with the Commission, pursuant to the provisions of the Panama Canal Act, an application for authority to continue its ownership in a common carrier by water. The Commission, after a consideration of the facts, dismissed the petition. In deciding the case, this court said at page 414:

> "The order of the Commission was negative in substance as well as in form. *Procter & Gamble Co.* v. *United States,* 225 U. S. 282, 292, 293. The risk to which the railroad was left subject did not come from the order but from the above-mentioned section of the Panama Canal Act (amending Section 5 of the Act to Regulate Commerce) making each day of violation a separate offence and the provision of the latter act, Section 10, which imposes a possibly large fine. This risk is the same that it was before the order or that it would have been if appellant had not applied to the Commission, except so far as the findings establish facts that we believe there is no desire to dispute. Without going further it appears to us plain that the decree of the District Court dismissing the bill was right."

Thus, that case was substantially different from the case at bar. Had the court taken jurisdiction, it would have been required to determine whether or not the relations between the boat line and the Railroad Company were competitive, and to this extent would have been required to substitute its judgment for that of the Commission. That is not so in the case at bar. Moreover, as was pointed out, the risk to which the Railroad was left subject resulted from the statute itself and not from the Commission's order; whereas, in this case the Commission's order constitutes the only lawful authority for the application of the present divisions of the reshipping rates.

In *United States* v. *Illinois Central Railroad,* 244 U. S. 82, the Railroad asked that an order of the Commission setting a case for hearing be set aside. After citing its decision in the *Procter & Gamble Case, supra,* this court said at page 89:

> "The notice, therefore, had no characteristic of an order, affirmative or negative. It was a mere incident in the proceeding, the accident of the occasion—in effect, and, it may be contended, in form, but a continuance of the hearing. The fact that the continuance was to another day and place did not change its substance or give it the character described in *Procter & Gamble Co.* v. *United States,* one which constrained the railroad company to obedience unless it was annulled or suspended by judicial decree."

As this court also pointed out (p. 89), the notice of hearing sought to be enjoined imposed no obligation upon the railroad, which might attend the hearing if it saw fit or stay away if it preferred. In the case at bar, however, the approval given by the Commission to the present divisions of the reshipping rates here involved makes those divisions the only ones having any authority. It undertakes to legalize divisions which plainly violate appellant's legal rights. It necessarily constrains appellant to accept those divisions, leaving it only the alternative of foregoing its rights by retiring from the traffic.

In *Manufacturers Railway Company* v. *United States,* 246 U. S. 457, the facts were intricate, but one question involved was that of the divisions to be allowed by the trunk lines to the Manufacturers Railway Company. Complainant, in filing its petition with the Commission, had asked that the divisions to be allowed to it be fixed by the Commission (p. 464). In deciding the case, after a supplemental hearing, the Commission stated that it would not fix the divisions by order at that time (p. 467). The case was thereafter reheard and the Commission is-

sued another report, only suggesting with respect to the divisions that the amount allowed the Manufacturers Railway should not be more than was just and reasonable (p. 469). Thus, notwithstanding the prayer of the petition, the Commission did not in that case fix the divisions by definite order. In deciding the case, this court held (p. 480) that the Commission was not obliged to fix the divisions but had the right to allow the carriers to make their own agreement. In dealing with the question, this court said at pages 482 and 483:

> "It hardly can have escaped attention that the real complaint of appellants respecting the order now under consideration is directed not to what the order requires to be done, but to what it does not require. * * * The real ground for resorting to the courts in this case is the failure to fix divisions. In effect the District Court was asked to perform a function specifically conferred by law upon the Commission. But that court has only the same jurisdiction that formerly was vested in the Commerce Court (Act of June 18, 1910, c. 309, 36 Stat. 539; Act of October 22, 1913, c. 32, 38 Stat. 208, 219); and it is settled that this does not permit the court to exercise administrative authority where the Commission has failed or refused to exercise it, or to annul orders of the Commission not amounting to an affirmative exercise of its powers. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, 292, *et seq.*"

The case only holds that a court is not given jurisdiction to fix divisions if the Commission fails to do so, since to fix such divisions would require the exercise by a court of an administrative function conferred upon the Commission. We do not ask that divisions be fixed in the case a bar, as we recognize the exclusive primary jurisdiction of the Commission over such a matter. And, we submit, the Commission has exercised that jurisdiction. Under its approval of the divisions involved, those divisions have been and are now being applied and that is all that would have happened in any event. Since

they must be conceded to be confiscatory, a court's jurisdiction to deal with them necessarily follows. Moreover, the case cited was decided in 1918, prior to the enactment of the Transportation Act, 1920, which placed upon the Commission a definite duty with respect to divisions.

United States v. *Los Angeles Railroad Company,* 273 U. S. 299, was a suit brought by the railroad to enjoin a valuation report of the Commission. After a brief discussion of the power of courts to enjoin orders of the Commission, this court said at pages 309 and 310:

> "The so-called order here assailed differs essentially from all those held by this Court to be subject to judicial review under any of those Acts. Each of the orders so reviewed was an exercise either of the quasi-judicial function of determining controversies or of the delegated legislative function of rate making and rule making.
>
> The so-called order here complained of is one which does not command the carriers to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation."

This language, we submit, supports the claim of jurisdiction made in the case at bar. In this case, the Commission certainly exercised its "quasi-judicial function of determining controversies", and finally determined a controversy between appellant and the Railroad Defendants with respect to the present divisions of the joint "reshipping" rates from Peoria-Pekin to the east. A more definite and complete disposition of a controversy could scarcely be made.

Moreover, the Commission's order with respect to the divisions of those rates does withhold an authority, privilege or license, since it deprives appellant of all right to insist that it receive just and reasonable divisions of the

joint reshipping rates; it does abridge a power of appellant, since it deprives appellant of all right to receive proper compensation for a common-carrier service performed by it, a right to which it is constitutionally entitled; it does subject appellant to a civil liability, since appellant has been left in the position of being required by law to perform an interstate transportation service without receiving compensation therefor; it does change appellant's future status or condition, since it deprives appellant of the right to receive, in the future at least, those divisions to which the law says it is entitled; and it does determine a right or obligation of appellant, since it fixes appellant's obligation to perform an interstate common-carrier service without a corresponding right to receive just compensation therefor.

In effect, it commands appellant to perform a service under the joint "reshipping" rates, so long as they are in effect, upon receipt of the divisions which it approves. And in the *Los Angeles Railroad Company Case, supra,* it was indicated that the right of the railroad to a judicial determination of value was preserved; whereas, in the case at bar appellant has no judicial remedy, if the lower court was correct in its decision.

In *Piedmont & Northern Railway* v. *United States,* 280 U. S. 469, the facts were that the railroad filed with the Commission an application for a certificate of public necessity permitting the construction of additional line, including therein an allegation that the Commission was without jurisdiction over the subject matter of the petition because the railroad was an interurban electric railway within the meaning of paragraph 22 of Section 1 of the Act to Regulate Commerce. In addition, the railroad filed a motion that its application be dismissed for want of jurisdiction. Overruling the motion, the Commission took jurisdiction and denied the application; whereupon

the suit was brought to set aside the order of denial. At pages 475 and 476 of its opinion, this court said:

> "Plaintiffs do not complain of the order's denial of a certificate of public necessity and convenience. They concede that no court has the power to compel the Commission to issue such a certificate, since no railroad subject to the provisions of the Act has a right to extend its lines. Therefore, the order denying a certificate, being negative in substance as well as in form, infringed no right of the Railway. Compare *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282; *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 412; *United States* v. *New River Co.*, 265 U. S. 533, 540."

This language emphasizes the different situation in the case at bar, for here appellant has a statutory right to receive just and reasonable divisions of the "reshipping" rates and, we submit, the Commission is under an obligation to grant them. Its refusal to do so therefore infringes appellant's right. The court further held in the case cited that it was controlled by the decision in *Lehigh Valley Railroad* v. *United States, supra,* since the risk of which the railroad complained arose from the statute and not the Commission's order. It was further said at page 477:

> "The order is entirely negative. It is not susceptible of violation and cannot call for enforcement. It does not finally adjudicate the Railway's standing; nor does it enjoin it to do or refrain from doing anything. The penalties provided in paragraph 20 are prescribed not for violation of an order of the Commission, but for violation of the provisions of the statute."

The situation in the case at bar is entirely different. Appellant is not seeking to avoid any liability created by statute. And while the order here attacked does not prescribe the present divisions of the "reshipping" rates in terms, it does adjudicate appellant's standing and require it to submit to the application of divisions which confiscate its property. The difference between the case

cited and the case at bar is illustrated by this court's statement at page 478 of the opinion in the case cited, where it was said:

> "The case is entirely different from those cases where an application for a certificate is alleged to have been erroneously granted, as in *The Chicago Junction Case*, 264 U. S. 258 and *Colorado* v. *United States*, 271 U. S. 153. There, a judicial review is provided in order to protect a legal right of the plaintiff alleged to have been infringed by an order which authorizes affirmative action."

So in this case, judicial review is necessary to protect appellant's legal right to just and equitable divisions, a right which is being daily violated under cover of the Commission's approval, which authorizes affirmative action by the Railroad Defendants.

In *United States* v. *A. B. & C. R. Co.*, 282 U. S. 522, an injunction was sought to set aside a paragraph in a report of the Commission dealing with the reorganization and control of the Railroad Company. The paragraph in question stated the amount which the new company should include in its balance sheet as representing investment in road and equipment. In holding that a court had no jurisdiction to enjoin such a statement, this court said at page 527:

> "The action here complained of is not in form an order. It is a part of a report—an opinion as distinguished from a mandate. The distinction between a report and an order has been observed in the practice of the Commission ever since its organization—and for compelling reasons."

Continuing, this court said at page 528 of its opinion:

> "Even in the regulation of rates, as to which the Commission possesses mandatory power, it frequently seeks to secure the desired action without issuing a command. In such cases it customarily points out in its report what the carriers are expected to do. Such action is directory as distinguished from mandatory. No case has been found

in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review."

This decision has no relation to the case at bar, since what the Commission has said here is at least in order form.

In *Standard Oil Company* v. *United States,* 283 U. S. 235, the suit was brought to set aside an order of the Commission dismissing a claim for reparation. As appears from page 237 of this court's decision, the petition filed in court not only asked for an injunction, but for an affirmative order finding that petitioner was entitled to the relief it claimed and ordering a further hearing, presumably by the Commission, for the purpose of determining the amount to which it was entitled. Also, as pointed out by this court at pages 238 and 239 of its opinion, the determination of the issue presented to the Commission required the application of expert knowledge and presented "unusually compliated and technical tariff situations, the proper determination of which called for the exercise of the trained judgment of that body of experts appointed by law and informed by experience."

In sustaining the claim that the court lacked jurisdiction, this court said at page 238:

> "The Commission made two reports, one following the original hearing, and the other after reargument. The order based upon these reports simply dismissed the complaints; that is to say, the Commission refused to grant any affirmative relief to the appellant. It is plain that the order is negative both in form and effect. The jurisdiction of the district courts (transferred from their predecessor, the Commerce Court), in this class of cases, embraces (1) those brought for the 'enforcement' of orders of the Commission, and (2) those brought to 'enjoin, set aside, annul, or suspend in whole or in part' such orders. It is obvious that this language was not intended to apply to purely negative or-

ders. A negative order which denies relief without more compels nothing requiring enforcement, and contemplates no action susceptible of being stayed by an injunction or affected by a decree setting aside, annulling, or suspending the order.

The question in the present case depends upon the correct interpretation and application of the second subdivision of the act conferring jurisdiction, referred to and quoted *supra;* and necessarily the district court was without jurisdiction under the settled construction of that provision by which the authority of the court is limited to the review of affirmative orders, with 'power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal.' *Procter & Gamble* v. *United States,* 225 U. S. 282, 292-293; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 483; *Piedmont & Nor. Ry. Co.* v. *United States,* 280 U. S. 469, 477."

It is obvious that this decision does not control the case at bar. We have not asked that the court fix the amount of the divisions to which appellant is entitled; nor does the determination of the issue presented require anything more than an application of well known legal principles. Nor does the order here involved deny relief "without more." It affirmatively determines appellant's status; imposes a definite burden upon appellant through acquiescence, and defeats the results sought to be accomplished by the law.

The cases we have cited are all of those which might be said to support the decision of the lower court. For the reasons we have given, none of them do support it. The distinction between those cases and the case at bar is well illustrated in other decisions of this court.

In *Intermountain Rate Cases,* 234 U. S. 476, the facts were that seventeen carriers had made application to the Commission under Section 4 of the Act to Regulate Commerce, for authority to maintain lower rates to and from Pacific Coast points than were maintained to and from

intermediate points. After hearing, the Commission granted part of the relief asked and denied the balance, whereupon the carriers brought a suit asking for a decree enjoining the order.

A major defense in the case was that the action of the Commission was purely negative and therefore not justiciable. At page 481, Section 4 of the Act, as amended June 18, 1910, is set out in full. It prohibited the charging of higher rates for a shorter distance than for a longer distance, the shorter being included within the longer distance; charging a greater compensation as a through route than the aggregate of the intermediate rates; but provided that upon application to the Commission, a carrier might be authorized by the Commission to charge less for longer than for shorter distances.

The present statutory provisions relating to divisions present the same situation. Section 1 (4) of the of the Act requires the maintenance of just, reasonable and equitable divisions between carriers. Section 13 (1) authorizes any common carrier to apply to the Commission to fix such divisions, which must then be fixed by the Commission upon a consideration of the factors enumerated in Section 15 (6). In the case cited, this court pointed out that the jurisdictional argument rested upon the assumption that since the order of the Commission refused to grant a request made, it was purely negative and could not be litigated. It was then said (p. 490):

> "The contention therefore presupposes that the power which from the beginning has been the subject of judicial review by the mere fact of its transfer to the Commission was made arbitrary. Besides, the proposition disregards the fact that the right to petition the Commission conferred by the statute is positive and while the refusal to grant it may be in one sense negative, in another and broader view it

> is affirmative since it refuses that which the statute in affirmative terms declares shall be granted if only the conditions which the statute provides are found to exist."

In this case as in that one, the right of appellant to receive a fair return for service performed by it antedates the Commission; the right of appellant to petition the Commission is positive and conferred by statute; and the duty of the Commission is definite. While that part of the order of the Commission here under attack denied the relief requested, it is certainly affirmative since it denies to appellant those just and reasonable divisions required by the statute.

United States v. *Merchants, etc. Association,* 242 U. S. 178, involved certain reports of the Commission supplemental to the order involved in the *Intermountain Rate Cases, supra.* The action was brought by four cities who claimed that they had been injured by the maintenance of rates higher than those to more distant points. The order of the Commission had granted part of the relief asked, as in this case, but not all of it. Apparently, the question of the court's jurisdiction was not raised.

In *Skinner & Eddy Company* v. *United States,* 249 U. S. 557, the suit was brought to set aside an order of the Commission directing the removal of a discrimination which the Commission held resulted from a 4th Section order previously made by it. The railroads undertook to remove the discrimination by increasing the rates to the more distant points, and the plaintiff sought to enjoin the increased rates. In defending the action, it was claimed that the court did not have jurisdiction of the subject matter of the suit. Dealing with this defense, this court said at page 562:

> "The contention proceeds apparently upon a misapprehension of plaintiff's position. If plaintiff had sought relief against a rate or practice alleged to be

> unjust because unreasonably high or discriminatory the remedy must have been sought primarily by proceedings before the Commission (citing cases); and the finding thereon would have been conclusive, unless there was lack of substantial evidence, some irregularity in the proceedings or some error in the application of rules of law (citing cases). But plaintiff does not contend that 75c is an unreasonably high rate or that it is discriminatory or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission. (citing cases) * * * The District Court properly assumed jurisdiction of this suit."

In the *Chicago Junction Case,* 264 U. S. 258, the suit was brought to set aside an order of the Commission permitting the acquisition by the New York Central Railroad of the Chicago River & Indiana Railroad and the Chicago Junction Railway. The order made by the Commission was permissive only, and imposed no obligation upon anybody. The defendants claimed that the order was not subject to judicial review, and in passing upon this defense, this court said at page 263:

> "Whether this order can be described properly as legislative may be doubted. It is clear that legislative character alone would not preclude judicial review. Rate orders are clearly legislative. *Prentiss* v. *A. C. L. Ry. Co.*, 211 U. S. 210, 226. Nor would the further fact that the order is permissive preclude review, if by that term is meant an order which, in contradiction to one compelling performance, authorizes a carrier to do some act otherwise prohibited."

Certainly, that part of the order attacked herein authorizes the Railroad Defendants to continue the application of divisions which confiscate appellant's property and are thus prohibited both by statute and by the Con-

stitution. After distinguishing the *Illinois Central Railroad Company Case, supra,* by pointing out that the notice there involved had no characteristic of an order, this court in the case cited, referred to the *Procter & Gamble Case, supra,* and other cases to the same effect, saying at page 264:

> "In *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302; and *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412, judicial review was refused, not because the order was permissive, or because it was negative in character, but because it was a denial of the affirmative relief sought. This Court declined to interfere, because to do so would have involved exercise by it of the administrative function of granting the relief which the Commission, in the exercise of its jurisdiction, had denied. Here the order complained of is an affirmative one. That is, it grants the relief sought. Compare *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 483."

This language is definite in stating the ground upon which the decision in the *Procter & Gamble Case, supra,* rested; a ground which, we submit, is obvious from the language used in that decision. In the case at bar, there is no request or requirement that the court exercise an administrative function of the Commission. And the order is affirmative in so far as it relates to the divisions of the "reshipping" rates, since it grants to the Railroad Defendants the relief requested by them; namely, the Commission's approval of the divisions established by them.

The Commission was under the same duty in the case at bar as rested upon it in the *Chicago Junction Case, supra.* At page 265 of the opinion in that case it is said:

> "Congress by using the phrase 'whenever the Commission is of opinion, after hearing,' prescribed quasi-judicial action. Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest.

> It may form this judgment only after hearing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it."

Section 15 (6) of the Act also contains the words,

> "Whenever, after full hearing upon complaint * * * the Commission is of opinion, etc."

This language imposed a duty upon the Commission in this case; a duty in which it failed.

The case of *United States* v. *New River Company*, 265 U. S. 533, presented almost the same facts as the case at bar. The suit was to set aside an order of the Commission which, it was alleged, approved a rule of coal car distribution known as Rule 4. The rule attacked was being applied by the railroads but had not been established by any order of the Commission. The New River Company filed a complaint attacking the rule and a Division of the Commission held that it was improper and approved a different rule known as the 150 Per Cent Rule. The Division, however, made no order requiring the application of the different rule, only saying that it expected the railroads to apply that rule.

A rehearing was granted and the entire Commission reversed the decision of the Division and approved Rule 4. It made no order, however, requiring that rule to be maintained, and did nothing else by way of order except to dismiss the plaintiff's petition to it. The suit was thereupon brought, not only to set aside the order of the Commission, but to enjoin the Railroad Defendants from applying the rule approved by the Commission. The plaintiff was successful in the lower court and the United States appealed. At page 539 of its decision, this court said:

> "The appellants contend the order is negative and therefore not subject to review by the court. They cite *Procter & Gamble Co.* v. *United States*, 225 U.

S. 282; *Hooker* v. *Knapp*, 225 U. S. 302 and *L. V. Ry.* v. *U. S.*, 243 U. S. 412."

After stating the facts in the *Procter & Gamble Case, supra,* this court said with respect to it (p. 539):

> "The question before this court (p. 292) was whether the Commerce Court had power to exert its own judgment by originally interpreting the administrative features of the Act to Regulate Commerce, and upon that assumption to treat the refusal of the Commission to grant the relief prayed for as an affirmative order, and accordingly to pass on its correctness. *Hooker* v. *Knapp* and *L. V. Ry. Co.* v. *U. S.* were decided on the authority of the *Procter & Gamble Case.* The opinion in that case, when viewed in the light of the report of the Commission, furnishes no support for appellant's contention here. In all of these cases affirmative relief sought was denied by the Commission. Judicial review was refused on that ground. The taking of jurisdiction in such cases would involve determination by the courts whether relief denied by the Commission in the exercise of its powers, should be granted."

Dealing with the case then before it, this court said at pages 540 and 541:

> "The mere fact that the order of the Commission dismisses the complaint of shippers against Rule 4 does not make it a negative order. * * * The order expressly includes the findings and conclusions stated in the report. It is not merely negative. Clearly, the order permits and authorizes the carriers to apply Rule 4. If that rule is illegal, as alleged, such permission and authority will not sustain it, and suit will lie to set it aside. The *Chicago Junction Case, supra.* Plainly, it was the intent and purpose of the Commission that Rule 4 should be applied in place of the 150 per cent rule. The effect of the order is to grant the relief sought by the operators of local mines. We hold that the District Court had jurisdiction."

We submit that this decision is conclusive in the case at bar. The *New River Case* and this case passed

through the same vicissitudes before the Commission. To paraphrase the language of this court in the *New River Case,* the order attacked in the case at bar expressly includes the findings and conclusions stated in both reports and is not merely negative. It clearly permits and authorizes the Railroad Defendants to apply divisions of the "reshipping" rates, which, it must be conceded, are noncompensatory and insufficient. If those divisions violate appellant's rights, the permission and authority of the Commission will not sustain them, and this suit will lie to enjoin their application. It is plainly the intent and purpose of the Commission in the case at bar that the divisions which we attack should be applied and the effect of the order is to grant that benefit to the Railroad Defendants. And the decision in the *New River Case, supra,* is definite in stating that the refusal to take jurisdiction in the *Procter & Gamble Case, supra,* was based upon the fact that to do so would have required the court to exercise a power conferred upon the Commission.

The trial court decided the issue of jurisdiction against appellant because the Commission refused to act with respect to the divisions of the joint "reshipping" rates. In the opinion it is said (R. 180):

> "After an examination of the facts, the Commission found that the divisions were not unfair and dismissed the complaint. It entered no other order; it merely declined to legislate."

This statement errs in fact, for the Commission's order here attacked did not direct a dismissal of appellant's complaint. The opinion then continues, referring to what the Commission did:

> "It did not order the Alton or its connecting carriers to abide by the previously maintained divisions; it did not direct the future maintenance of the existing divisions; its action was equivalent to say-

ing 'We do not find the situation such that we should fix divisions; that is, we find no reason to exercise our legislative administrative power.' "

Again, it is later said in the opinion (R. 184):

"To exercise jurisdiction would amount to the determination of questions which the Commission has refused to consider in its legislative and administrative capacity and which we are therefore not free to consider."

We submit that in reaching these conclusions under the facts in the case at bar, the lower court misconstrued and misapplied the decisions of this court and failed to appreciate the requirements of the statutory law. The fact that the order assailed denies the relief requested with respect to the divisions of the joint "reshipping" rates does not determine the question. This was also the form of the order in the *Intermountain Rate Cases, supra,* and the *New River Case, supra.* The failure of the order to prescribe in terms the present divisions of the "reshipping" rates is not decisive, for this was the situation under the orders attacked in the *New River Case, supra,* the *Intermountain Rate Cases, supra,* the *Skinner & Eddy Case, supra,* and the *Chicago Junction Case, supra.*

Nor is it decisive that all the relief requested by appellant was not granted by the Commission; that appellant is left in the same position with respect to the divisions involved as it was when it went to the Commission; and that appellant and the Railroad Defendants are left free to change those divisions. The same circumstances obtained in the cases just cited. The important considerations are the effect of that part of the order here attacked, whatever its form, and whether or not the taking of jurisdiction by the court would have required it to usurp an administrative function of the Commission.

Thus, in the *New River Case, supra,* this court said (p. 541) that the effect of the dismissal order of the Commission was to grant the relief sought by the local mines in their petition for rehearing. In the case at bar, the effect of the Commission's order, in so far as it relates to the divisions of the "reshipping" rates, is to grant the relief sought by the Railroad Defendants in their petition for rehearing. That part of the order meets the test prescribed in the *Los Angeles R. R. Co. Case, supra,* since it fixes a liability and obligation of appellant.

Its character and effect may be tested by assuming that the Commission had made an order prescribing the present divisions of the joint "reshipping" rates here involved. Certainly, a court would have jurisdiction of the order in that form. Yet its effect would have been the same as that of the order made. It would have required no change in existing divisions, and would have left the parties as it found them. It would have denied the relief requested by appellant and granted that requested by the Railroad Defendants. If set aside, such action would not have left reasonable divisions in effect. It would not have left the railroads free to make any divisions they wished, but this is an unimportant difference, since the Railroad Defendants are now applying the divisions approved by the Commission in the order made.

And it is certain that the taking of jurisdiction under the petition filed herein by appellant would not require the court to usurp any administrative function of the Commission. This constitutes the marked distinction between the case at bar and the cases relied upon by the lower court and referred to herein. In the *Procter & Gamble Case, supra,* the court would have been required to fix proper demurrage rules after a consideration of payments made by railroads for the use of private cars. In the *Hooker Case, supra,* and the *Standard Oil Com-*

pany Case, supra, the court would have been required to determine the reasonableness and applicability of rates under detailed and intricate tariffs. In the *Lehigh Valley R. R. Co. Case, supra,* the court would have had to determine whether or not competition existed in fact. In the *Manufacturers Railway Co. Case, supra,* the court was asked to fix divisions. In the *Piedmont & Northern R. R. Co. Case, supra,* the court was asked for a declaratory decision. None of these situations obtain in the case at bar, for we do not ask the court to fix divisions or instruct the Commission with respect thereto. We only ask that appellant's constitutional rights be protected; rights of which, we submit, appellant cannot be deprived because of the wording of the Commission's order.

The opinion of the lower court also errs in other respects. Thus, the court said (R. 179):

> "Joint rates must be filed with the Commission and when so filed and approved they become matters controlled by official edicts of that body. But divisions, in the absence of relieving orders, are not so filed but are left to and fixed by the carriers themselves."

But the jurisdiction of the Commission over divisions is as full and complete as its jurisdiction over rates. True, rates are required to be filed with the Commission and divisions are not, but this is because rates directly affect the public and the filing of them with the Commission gives that notice which the law requires. Divisions, on the other hand, do not directly affect the public and are thus left primarily to agreement between the carriers. This fact, however, does not affect the Commission's jurisdiction over them.

Continuing, the lower court said in its opinion (R. 179):

> "Clearly there must be some administrative order

> upon divisions, in pursuance of the Commission's legislative power before it can be said that legislation has occurred."

Precisely the same thing is true of rates. It cannot be said that the Commission has legislated upon rates merely because they have been filed with the Commission. And in the case at bar, the Commission has made an administrative order with respect to the present divisions of the joint "reshipping" rates. It has effectually prescribed them for the future.

The lower court further held (R. 180) that in dealing with the divisions of the "reshipping" rates here involved, the Commission had only elected not to exercise its legislative administrative power and that a court had no power by mandatory injunction to require an administrative branch of the Government to exercise such power. We submit that this is in error, for the Commission, in dealing with divisions of joint rates under the present law, does not have the same choice to act or not to act as an ordinary legislative body would have. Its obligations are fixed by that law which creates it. The right of appellant to receive just and reasonable divisions of the rates here in issue is established by Section 1 (4) of the Act, and the Commission's positive duty is to fix such divisions. That duty is not discharged by the approval of divisions which are certainly confiscatory.

And had the Commission refused to take jurisdiction and exercise its authority in the case at bar it could have been required to do so through mandamus. *Interstate Commerce Commission* v. *Waste Merchant's Ass'n.*, 260 U. S. 32, 33, 34. But the Commission has in fact legislated in the case at bar. It took jurisdiction of the case, held hearings, received all of the evidence, and then decided the case.

In citing the *Procter & Gamble Case, supra* (R. 181) the lower court lost sight of the ground upon which the denial of jurisdiction was based. In citing the *Manufacturers Railway Company Case, supra* (R. 182), no consideration was given to the fact that the court was there asked to fix divisions. In citing the *A. B. & C. Railway Company Case, supra* (R. 183), it was apparently not considered that what is here sought to be enjoined is designated as an order by the Commission and is in fact an order. In citing the *Los Angeles R. R. Co. Case, supra* (R. 183), it is said (R. 184) that the order here complained of does not withhold any authority or privilege or abridge any power. It seems to us that it plainly does, since as a direct result of it appellant is denied the right and privilege of receiving compensation for a common-carrier service performed by it and is deprived of the power of insisting that it receive such compensation.

In attempting to distinguish the *New River Company Case, supra,* from the case at bar the lower court said (R. 183):

> "In the instant case, the order does not authorize or permit the divisions complained of, it is merely a refusal upon the part of the Commission to interfere, and, as the Court said in the last cited case, 'the taking of jurisdiction in such cases would involve determination by the courts whether relief denied by the Commission in the exercise of its powers, should be granted."

Obviously, the lower court did not appreciate the effect of the decision of this court in the *New River Case, supra.* As we have heretofore pointed out, the Commission's order there involved only granted to some of the mines the relief sought through the medium of a statement in the report that the rule they asked was the proper one. The order itself only dismissed the peti-

tion filed with the Commission. In this case, the dispute between appellant and the Railroad Defendants is as sharply drawn as was the dispute between the different coal companies in the *New River Case*. And in both cases, the Commission decided the issue through a finding in the report, which statement, in the case at bar, is reiterated in the order.

The permission and authority granted by the Commission in the *New River Case* was certainly no more comprehensive than the permission and authority granted the Railroad Defendants in the case at bar. The extent of the permission and authority here granted may be judged by the fact that although the Commission has conceded authority to stop the practice, appellant is being currently required to handle traffic for no compensation whatever. Nor would the taking of jurisdiction require this court to determine whether or not the divisions asked for by appellant were proper, since no paragraph of the petition in the lower court requests that this be done.

The basis upon which the decision of the lower court is founded is summed up in the statement heretofore quoted (R. 184) that:

> "To exercise jurisdiction would amount to the determination of questions which the Commission has refused to consider in its legislative and administrative capacity and which we are therefore not free to consider."

This statement is in error. The Commission did in fact consider the propriety of the present divisions of the joint "reshipping" rates and held them to be just and reasonable. And the lower court was free to consider the matter since it was not asked to substitute its judgment for that of the Commission. It was only asked to determine whether or not those divisions approved by the Commission violated appellants' legal rights.

This suit was brought in the only court having jurisdiction, *Venner* v. *M. C. R. R. Co.*, 271 U. S. 127, 130, and the court certainly had power to enjoin the Railroad Defendants as prayed. *B. & O. R. R. Co.* v. *United States*, 279 U. S. 781, 785. Under these circumstances, if the order here assailed is not justiciable, appellant is deprived of its right to a judicial review of an obvious violation of its constitutional rights. The holding that such a result may be justified by a form of words is repugnant to every principle of law and justice.

II.

ON THE MERITS, THAT PORTION OF THE COMMISSION'S ORDER HEREIN ATTACKED, RELATING TO THE DIVISIONS OF THE "RESHIPPING" RATES, SHOULD HAVE BEEN SET ASIDE, AND THE RAILROAD DEFENDANTS ENJOINED FROM APPLYING THOSE DIVISIONS.

The conclusion is obvious that on the merits, that portion of the Commission's order of December 7, 1931, dealing with the divisions of the "reshipping" rates is wrong and should be set aside. It is indeed so obvious as to scarcely require argument in view of the earnings left to appellant under the divisions approved by the Commission. We, nevertheless, desire to call to the court's attention some of the more obvious errors in fact and law committed by the Commission in reaching the conclusion it did.

A. *The divisions approved by the Commission violate appellant's statutory and constitutional rights.*

This is a matter to which we have heretofore referred. The fact was proven on the record before the Commission and is so obvious as to require no argument. Indeed, in the hearings before the Commission, no conten-

tion was made by the Railroad Defendants that the divisions allowed by them to appellant out of the "reshipping" rates were just, reasonable or compensatory. On the contrary, it was only suggested that appellant should avoid the confiscation of its property by going out of the business and canceling its participation in the rates, a matter to which we shall hereafter refer.

B. *The Commission erred in holding that for the purposes of this case, the inbound and outbound shipments to and from Peoria-Pekin were not separate and distinct shipments.*

In the dissent to the first report of Division 5 of the Commission (R. 33 *et seq.*) is stated those reasons which prompted a majority of the Commission to reach the conclusion that it did upon rehearing. The second report denies just and reasonable divisions of the "reshipping" rates to appellant partly because of the theory that the movement of grain, grain products and grain by-products from Peoria-Pekin to the east is an integral part of the prior movement of those commodities or their equivalents into Peoria-Pekin from points west thereof; and because of the thought that the case involved the propriety of the transit arrangements at Peoria-Pekin. Thus, it is said in the dissent to the first report (R. 34):

> "To treat the inbound and outbound shipments as separate and distinct is hopelessly repugnant to the principle of transit. * * * The underlying theory of transit is that of a continuous transportation from the point of origin to the ultimate destination."

Again, it is further said in the dissent to the first report (R. 35):

> "Under all of these circumstances is it the part of wisdom for this commission now, after all of these many years of approbation, by court and commis-

> sion alike, of a practice which antedates the interstate commerce act itself, *Transit Case*, 24 I. C. C. 340, 348, to throw into the discard a principle or theory which is inseparably bound up with the practice of transit, which has been and is beneficial to both carrier and shipper, and which has been ingrained into and become an exceedingly important part of the business structure of the country, solely because of *obiter dicta* observations made by the Supreme Court."

The *obiter dicta* observations there referred to are those said to be contained in the decision of this court in *A. T. & S. F. Ry.* v. *United States*, 279 U. S. 768.

In attempting to state appellant's position, the Commission said in its second report (R. 45):

> "The complaint of the Alton rests squarely upon its contention that on this traffic accorded transit at Peoria it must be regarded as an originating carrier because, it contends, the outbound shipments from Peoria on these proportional rates are entirely separate and distinct from all prior transportation. To this contention we cannot subscribe."

It was further said (R. 46):

> "In this case therefore we must give full effect to the transit provisions at Peoria under which these shipments move in our consideration of the lawfulness of the divisions received by the respective carriers, parties to these outbound reshipping rates. * * * Thus regarded, the proportional rates from Peoria are merely parts of the through rates, and the Alton is only an intermediate and not an originating carrier on this traffic. If the claim of the Alton were sustained and these shipments accorded transit at Peoria were regarded as local shipments, it would inevitably follow that the transit provisions at Peoria would be of no effect on this traffic and the local and not the reshipping rates from that point would be applicable."

We submit that the holding of the Commission in this respect was wrong. As appears from the petition filed with the Commission (R. 13 *et seq.*), the only issue pre-

sented to that body for adjudication was the propriety of the divisions of the joint "local" and "reshipping" rates from Peoria-Pekin to the east. No issue was raised as to the rates inbound to those points or the traffic moving under them. The determination of the issue presented did not at all depend upon the transportation of any commodities to Peoria-Pekin; upon transit at that point; or upon the through movement of commodities under through rates through those points. This results from the character and application of the rates.

As we have said, the rates to Peoria-Pekin are separately published rates, either local or proportional. Thus, if the Atchison, Topeka & Santa Fe Railroad hauled a shipment of grain, its products or by-products into Peoria, it might do so on a local rate if the shipment originated at a local station on its line, or on a proportional rate if the shipment originated at a transit point such as Kansas City and had had previous movement into Kansas City. In either case, the rate applied would be published by the Santa Fe only, and neither appellant nor any Railroad Defendant would be a party thereto or perform any transportation service thereunder. The Santa Fe would collect and retain all of the revenue for the movement into Peoria-Pekin. (R. 93, 104, 105).

Certainly, such a movement and the revenue collected for it has no bearing upon the division of a joint rate charged by different carriers for the movement of a different shipment between different points. The fact that through rates might apply via Peoria-Pekin on shipments moving through those points is not important, even though the joint "reshipping" rates from Peoria-Pekin were parts of those rates. The distinction between joint rates and through rates is pointed out in

St. L. S. W. Ry. Co. v. *United States,* 245 U. S. 136, note 2, p. 139. In this case the shipments via Peoria-Pekin were not through shipments under through rates, but in any event, the point does not control the fixing of the divisions of the joint rates involved.

Nor should transit at Peoria-Pekin have been given any weight in determining the issue presented to the Commission. The only effect of transit at those points is that it determines the actual amount of the "reshipping" rate from those points to the east. Shipments from Peoria-Pekin under those rates might legally be new shipments but because made within twelve months after an inbound movement into Peoria, they would move upon a lower rate. Other shipments might also be new shipments legally, but would take the higher joint "local" rate because not accompanied by billing showing an inbound movement within the preceding twelve months.

Had the Commission seen fit to allow to appellant proper divisions of the joint "reshipping" rates, such a disposition of the case would have had absolutely no effect upon either the rate or transit situation. The rates would still have applied to, from and via Peoria and Chicago as they had always applied. Their volume would not have been changed. Transit would have remained and been applied as it has always been applied.

Even upon the Commission's rate and transit theory, its decision was wrong, for in any case appellant was at least an intermediate carrier. As such a carrier performing a carrier service it was entitled to receive for its services its fair proportion of the entire revenue collected. Yet, the Commission's conclusion gives it nothing on much of the traffic and not enough on the balance of the traffic to pay its operating expenses. We

know of no rule of law which requires a carrier to perform its services for no compensation merely because it is an intermediate carrier.

Moreover, the Commission's decision with respect to the character of the outbound shipments from Peoria-Pekin under the joint "reshipping" rates was wrong legally under the facts in this case. As we have said, when a shipment to Peoria-Pekin reaches either of those points it is delivered to the grain elevator, the car is released and the freight charges are paid. Every liability of the inbound carrier ceases. At this time no one knows what disposition will be made of the shipment. It may be sold or resold; it may remain in Peoria or Pekin or it may be manufactured into another commodity and be shipped elsewhere, in which case it may move either under one of the "reshipping" rates or a local rate. Its identity is not preserved, but it is mixed with other shipments of the same kind.

When the outbound shipment is made under the "reshipping" rates the commodity need not be the same commodity as that which moved inbound to Peoria-Pekin. A new bill of lading is issued and a different car furnished (R. 93, 94). These were the precise circumstances in the case of *A. T. & S. F. Ry. Co.* v. *United States,* 279 U. S. 768. This court there said at page 774 in stating the contentions made by the plaintiff:

> "The Santa Fe, regarding the grain in storage at Kansas City as tonnage which, although temporarily held in abeyance, is in the course of a through movement and, as such, is to be held on its lines, makes this argument, etc."

Dealing with this contention, this court said at page 777:

> "The contention that the Santa Fe's canceled tariff was legally part of a through rate is also unsound. The argument rests upon a fiction—the

> fiction of a through rate with transit privilege. As applied here, the fiction is inconsistent with every fact of legal significance."

Yet in the case at bar, under identical facts, the Commission has held (R. 46) that shipments via Peoria-Pekin, moving from those points under the joint rates here involved, are through shipments moving under through rates with transit privilege. Dealing further with the claim made in the case cited, this court said at page 779:

> "When the outbound shipment from Kansas City is made, the grain goes forward on a new bill of lading at the balance of the through rate. Obviously, this practice cannot convert the independent shipment of grain from Kansas City to the Gulf via the Southern into a through movement from Dodge City to the Gulf. The two transportation services are not only entirely distinct, but they are often rendered in respect to wholly different merchandise. This convenient fiction is employed as a juristification for the discrimination involved in giving rates lower than those ordinarily applicable to the service outbound."

The Commission has said (R. 46) that the foregoing decision is not in conflict with its views in the case at bar. It seems to us that they are in direct conflict. This court's decision as to the character of the outbound shipments from Kansas City was certainly not dictum, since it disposed of a major contention made by the plaintiff in the case cited. On the facts presented to it, this court held that those outbound shipments were not parts of through shipments under through rates. On identical facts, the Commission has held the direct opposite.

Nothwithstanding the Commission's statement to the contrary (R. 45), appellant did not, for the reasons given, base its claim before the Commission solely upon the independent character of the shipments under the

joint "reshipping" rates. It was claimed that they were new shipments (R. 108), but only from the standpoint of the case presented. They were necessarily new shipments from a divisions standpoint, since the only rates sought to be divided applied only on shipments from Peoria-Pekin and could only be divided among the railroads publishing them and performing a service under them.

C. *The Commission erred in concluding that appellant should be required to retire from the handling of traffic under the joint "reshipping" rates and cancel its participation in those rates.*

It must be inferred that the Commission decided in this case that appellant should cease handling traffic under the joint "reshipping" rates and cancel its participation in those rates. This inference is compelled by the volume of the divisions imposed upon appellant with the Commission's approval. It was also stated rather definitely, for the Commission said (R. 47, 48):

> "The proportional rates from Peoria apply in connection with the Alton, not only via Chicago, Joliet and Dwight, but also via junctions south of Dwight, such as Chenoa, Ill., to which the haul of the Alton is considerably shorter than to Dwight, and it is not necessary for this traffic after it reaches the Alton to move via its northern junctions. All of this traffic may now move through Ashland and Springfield, Ill., in connection with the Baltimore & Ohio. * * * On grain and by-products from the Northwest the proportional rates from Peoria are now restricted so as not to apply via Chicago, and the same restriction could readily be made on grain products."

The Commission's reason for reaching this conclusion is not stated. It is only certain that it concluded the "reshipping" rates should not apply over appellant's line through Chicago, Joliet and Dwight. The Railroad Defendants apparently do not wish this result, since

they have abandoned their efforts to cancel the rates. Some of them which do not have rails to Peoria wish to continue appellant's participation in the traffic, so that they may also participate by receiving the traffic at junctions north of Peoria-Pekin (R. 140). Appellant does not wish to give up its present right to handle traffic under the rates involved and, we submit, may not be required to do so on the record made.

This case did not involve any question of routes or rate application. It only involved the division of joint rates already in effect and which had been in effect for many years. A decision on this issue which takes into account the propriety of the rates and the routes over which they applied, is wrong for a variety of reasons. One is that there was no question of rates or routes in the case, and appellant was not advised that there would be. Another is that those parties who would have a vital interest in the cancellation of appellant's route from Peoria-Pekin to the east were not parties to the proceedings before the Commission and were not heard. We refer to those shippers who, when the Railroad Defendants attempted to cancel some of the joint "reshipping" rates via appellant's line, objected so strenuously that the canceling tariff was suspended by the Commission and thereafter voluntarily withdrawn (R. 167). Another is that the record does not contain sufficient evidence to justify a direct or indirect requirement that appellant cancel its participation in the "reshipping" rates.

At the present time appellant is a party to the "reshipping" rates and not only has an absolute legal right to engage in transportation under them, but has a legal obligation to do so. We might concede the possible jurisdiction of the Commission upon a proper record, to require appellant to cancel its participation in these

rates. But that is not the situation presented. Apparently recognizing the insufficiency of the record and that questions of rates and routes were not within the issues made in the case, the Commission has sought to produce the result desired through indirection, by the approval of divisions which, if continued in effect, will certainly compel appellant to withdraw from the traffic.

The Commission has frequently held that a failure of carriers to agree upon divisions is of no importance in fixing rates, *Boston Wool Trade Ass'n.* v. *A. & K. Ry. Co.*, 142 I. C. C. 39, 41, 42; *Limestone from Illinois Points*, 74 I. C. C. 345, 348; *Through Rates from Buffalo-Pittsburgh Territory*, 36 I. C. C. 325, 328; and that the application of rates cannot be made dependent upon the existence of divisions *National Lumber Co.* v. *A. F. & S. Ry. Co.*, 50 I. C. C. 133, 134; *Gwinn Bros.* v. *C. & O. Ry. Co.*, 56 I. C. C. 298, 300. It would, therefore, seem that the raising of a divisions question would not require or justify a decision on the propriety of the rates sought to be divided.

D. *In passing upon the divisions of the "reshipping" rates, the Commission failed to give proper consideration to the matters which the law required it to consider and disregarded the evidence relating thereto.*

Section 15 (6) of the Act to Regulate Commerce (U. S. C. A. Title 49, Sec. 1 to 15a, p. 426) prescribes those matters which must be taken into consideration by the Commission in fixing divisions. To give due and proper consideration to these matters is an obligation of the Commission, and divisions fixed by it without that consideration will not be sustained. *New England Divisions Case, supra,* page 194; *United States* v. *A. & S. Ry. Co., supra,* page 284; *Brimstone R. R. Co.* v. *United States, supra,* pages 300, 301. The proof submitted by appel-

lant in this case to the Commission covered all of these matters. This appears from the majority report of Division 5 upon the first submission of the case, and the statement in the majority report on rehearing (R. 48) that

> "The other matters which section 15 (6) requires us to consider in our determination of divisions of joint rates, facts with respect to which are of record and which we have considered in reaching our conclusions herein, are sufficiently recited in the original report."

It is obvious, however, from a reading of the second report of the Commission that its decision with respect to the divisions of the joint "reshipping" rates was not at all based upon any consideration given by it to those matters which, under the law, it should have considered. On the contrary, the report affirmatively shows that with the exception of the importance of appellant's service to the public, the only considerations which moved the Commission to reach the conclusion it did were those relating to matters not in issue and not presented to it for adjudication. With respect to the importance of appellant's service the Commission said, after referring to the application of various rates not involved in the proceeding and to transit generally (R. 48):

> "These facts are important in our consideration of 'the importance to the public of the transportation services' of the Alton for the performance of which it is here seeking increased divisions, an element which section 15(6) of the act requires us to consider. No shipper or community has expressed any concern over the continuance of those transportation services by the Alton, and this record affords no support for a finding that they are important to the public."

It may only be concluded from this language that in its second report, the Commission decided that the transportation service of appellant under the joint "reship-

ping" rates was of so little importance to the public that appellant should receive nothing for that service. We submit that this is certainly not so. There is a limit beyond which even the Commission may not go in assigning weight to the various factors enumerated in Section 15 (6) of the Act. If it reaches a conclusion which is unreasonable or arbitrary or produces a violation of constitutional rights, the fact that such a result is reached upon what is said to be a consideration of the matters enumerated in the statute adds nothing to the validity of the conclusion. This has been held many times by this court. *Manufacturers Railway Company* v. *United States, supra,* page 481; *United States* v. *Chicago, etc. R. Co.,* 282 U. S. 311, 327; *Railroad Commission Cases,* 116 U. S. 307, 331; *Reagan* v. *Farmers Loan & Trust Company,* 154 U. S. 362, 399; *C. M. & St. P. R. Co.* v. *Wisconsin,* 238 U. S. 491, 501. And in direct relation to the matter of public interest, this court said in *Northern Pacific R. Co.* v. *North Dakota,* 236 U. S. 585, at page 595:

> "The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement."

In *United States* v. *A. & S. Ry. Co., supra,* a case involving divisions and the power of the Commission under Section 15 (6) of the Act, it was specifically held (pp. 284, 285) that divisions fixed after a consideration of the matters enumerated in the law must be "adequate to avoid a confiscatory result." Moreover, any finding of the Commission that the continuance of appellant's service under the joint "reshipping" rates was not in the public interest was contrary to the evidence in the record. The only evidence relating to this subject was offered by appellant and affirmatively showed that

appellant operated one of the oldest railroads in the State of Illinois; that its service between Peoria on the one hand and Dwight, Joliet and Chicago on the other, was of the greatest importance since it served a large community dependent upon that line for transportation (R. 113). Nothing was offered in contradiction of this evidence.

The finding of the Commission in this respect, thus made without evidence, is also directly contrary to its decision in *C. & A. R. R.* v. *T. P. & W. R. R.*, 146 I. C. C. 171, 176, where it was held that public interest required the continuance of transportation by appellant over the same line of railroad as that used in transporting traffic under the "reshipping" rates here involved.

The quoted statement of the Commission in its second report is also contrary to the fact. It is true that in this case no shipper was involved, but this was because the case, as presented to the Commission, did not affect any interest of any shipper or receiver of freight. It was entirely a dispute between railroads, and no shipper had any knowledge or notice that any question of rates and routes was involved. There was, therefore, no reason why any "shipper or community" should express any concern. The record does show, however, as we have heretofore said, that in the interval between the first and second hearings in this case, certain of the Railroad Defendants attempted to cancel some of the joint "reshipping" rates here involved; that this proposed action was protested by shipping interests at Chicago and Peoria; and that upon hearing the proposed cancellation was voluntarily withdrawn (R. 167). Obviously, the proposed cancellation of these rates would not have been opposed had not the protestant shipping interests been interested in the maintenance of appellant's route from Peoria-Pekin to the east.

In addition, the record shows that the interest of some of the Railroad Defendants requires the continuance of appellant's route on this traffic. Those eastern lines having their own rails from Peoria-Pekin to the east and wishing to handle all the traffic, doubtless desire that appellant be eliminated from the route. Eastern lines such as the Michigan Central Railroad, Pere Marquette Railroad and Grand Trunk Railroad, however, can only participate in traffic under the joint "reshipping" rates by receiving that traffic from railroads which do reach Peoria-Pekin, and are thus only permitted to participate in the business because of the participation therein of roads, such as appellant, which reach Peoria-Pekin but do not have their own rails to the east (R. 162). One witness for the Railroad Defendants testified in this case that his railroad does not have a line to Peoria; that the only way in which it can participate in traffic to and from that point is by getting it from a connecting line, and that he conceded the right of appellant to participate in traffic under the joint "reshipping" rates for the purpose of hauling that traffic to the connection between his road and the line of appellant (R. 140).

From the foregoing, it is obvious that the Commission, in reaching the conclusion that it did with respect to the divisions of the joint "reshipping" rates has not only disregarded its duties and obligations under Section 15 (6) of the Act, but has also disregarded the evidence of record, and its own decisions.

E. *The findings made by the Commission and upon which its conclusion with respect to the divisions of the joint "reshipping" rates was apparently based, are not supported by any evidence in the record of the proceedings before the Commission.*

In the report on rehearing it is said (R. 47):

"The transportation services performed by de-

> fendants east of Chicago on all of such shipments are the same, and this record refers to no transportation reason for requiring defendants to accept less or different revenue on one than on the other."

This statement sets up a false standard for fixing divisions and is not in accordance with the record. The Railroad Defendants should accept less on traffic from Peoria-Pekin to the east than from Chicago to the same destination because the distances are greater from Peoria-Pekin and because the revenue must be divided with additional carriers. The joint "reshipping" rates are either the same from both points or not sufficiently higher in the case of traffic from Peoria-Pekin to give every railroad what it thinks it should have. This fact is controlling, since in dividing revenue under joint rates only that revenue can be divided which is actually collected.

It is not unusual for a railroad to perform the same service on two separate shipments and yet receive less revenue on one than on the other. This results from variations in rates as related to volume of service. Thus, for example, on grape-fruit from Texas to Chicago, appellant receives 38 cents per hundred pounds for its haul from Kansas City to Chicago, but on grape-fruit from California to Chicago it gets 25.5 cents per hundred pounds for precisely the same service performed over the same track. The division on the Texas traffic was fixed by the Commission and the division on the California traffic has been approved by an Examiner for the Commission (R. 169).

And if the Railroad Defendants, in the division of the joint "reshipping" rates, performed an identical service from Chicago and from Peoria-Pekin for varying revenue, they would be in precisely the same position as appellant has been placed. At the present time, on some

of the reshipped traffic from Peoria-Pekin, appellant receives nothing; on some it receives ½ cent a hundred pounds and on some it receives 2 cents per hundred pounds. On all of the traffic moving under the joint "local" rates it receives substantially greater earnings than on any of the traffic moving under the joint "reshipping" rates. Despite these varying returns, the service performed by appellant on all of the traffic is identical.

In fact Exhibit 15 before the Commission (certified to this court, R. 90) shows that in most instances, a carload from Peoria-Pekin to the east is composed partly of commodities moving under the joint "local" rates and partly of commodities moving under the joint "reshipping" rates. On these carloads, appellant receives a different return for each part of the carload, although its service on the entire carload is necessarily the same. A Railroad Defendant handling such a carload is, of course, in the same situation.

Even in deciding this case, the Commission ignored the matter of the varying revenue of appellant, for it substantially increased appellant's division of the joint "local" rates, while approving the divisions of the joint "reshipping" rates. Appellant's service is the same under both rates, and as we have said, both rates frequently apply to different parts of the same carload.

The fact is that in the division of the "local" rates both appellant and the Railroad Defendants are satisfied. Each gets what it thinks it ought to have because there is sufficient total revenue. Under the "reshipping" rates, however, the total revenue is apparently insufficient to give every road as much as it wants, and therefore both should take less than they get on the local shipments, even though the service performed by

both is the same on both classes of traffic. This results from the insufficiency of the rate, a matter not in issue in the proceeding before the Commission.

Continuing along the same line, the Commission said (R. 47):

> "Neither does the record disclose any substantial differences in the line-haul services of the western carriers, including the Alton, on any of this traffic, but if there were such differences and those differences should warrant greater revenue to the Alton on shipments accorded transit at Peoria than it is now receiving, such increase in revenue to it, it would seem, should come from the portion of the through rate accruing to the western lines and not from the portion now retained by the lines east of Chicago."

This court should understand that what the Commission here suggested is that appellant should get from a railroad handling traffic into Peoria-Pekin, part of the revenue collected by that railroad, although appellant is not a party to the rate and performs no transportation service under it. As suggested by Commissioner Eastman in his dissenting opinion (R. 49), it is not clear to us just how this could be done. So far as this case is concerned, the only rates participated in by appellant are the joint "reshipping" rates from Peoria to the east, and the only service performed by appellant is performed under those rates. It seems quite obvious that any revenue that it might receive must come from those rates, and this fact was admitted by witnesses who testified in the hearings before the Commission (R. 136, 143, 144).

In its report on rehearing, the Commission also said (R. 47, 48):

> "On most of the traffic here considered the route employed by the Alton is circuitous. The proportional rates from Peoria apply in connection with

> the Alton, not only via Chicago, Joliet and Dwight, but also via junctions south of Dwight, such as Chenoa, Ill., to which the haul of the Alton is considerably shorter than to Dwight, and it is not necessary for this traffic after it reaches the Alton to move via its northern junctions. All of this traffic may now move through Ashland and Springfield, Ill., in connection with the Baltimore & Ohio."

This statement of the Commission with respect to the circuity of appellant's route is not supported by the evidence of record. Exhibits 13, 14 and 16 before the Commission (all certified to this court; R. 89, 92) state the routes traversed by over 6,500 cars moving under the joint "reshipping" rates from Peoria-Pekin over the line of appellant, show these routes in map form and state the actual mileages from Peoria-Pekin to eastern destinations. These exhibits show that from Peoria-Pekin to eastern destinations the line of appellant, in combination with the lines of the Railroad Defendants, forms one of the shortest available routes.

What the Commission doubtless had in mind was that the routes from some points west of Peoria-Pekin, via Peoria-Pekin to the east, were longer than the routes from those same points via Chicago to the same eastern destinations. This is true in the case of some traffic, principally that which originates in the northwest, but these routes are maintained because of the desire of all railroads to continue Peoria as a transit point upon equalized rates. This was the thought of the Railroad Defendants, for on rehearing one of their witnesses, after complaining of appellant's participation in the joint rates from Peoria-Pekin to the east, said (R. 160):

> "My statement boils down to a complaint against the publication of transit rates via Peoria via those railroads. The rates, however, are published that way. The rates here involved are in effect from Peoria to New York with transit at Peoria, but if the

> Peoria combination had not been revised so as to be the same are the Chicago combination, the Alton would be out of the business unless it became a party to the rates of the western lines to Chicago via Peoria. The Alton gets in on the business because of the rate equalization."

These matters, we submit, are not of any importance in determining the circuity or noncircuity of appellant's route from Peoria-Pekin to the east under the joint rates here in issue. But even on the theory of circuity apparently adopted by the Commission, that body has fallen into error. Peoria-Pekin is directly intermediate between such points as Kansas City and St. Joseph, Missouri, and Buffalo, New York. Exhibit 14 before the Commission (R. 89) shows that there could scarcely be a shorter and more direct route between Kansas City, which is a large grain storage point, and Buffalo than through Peoria. Yet on traffic handled over this direct route via the Santa Fe to Pekin, the Alton to Joliet, and the Michigan Central to Buffalo, the revenue to appellant approved by the Commission and received by it out of the joint rate from Peoria to Buffalo, is 2 cents per hundred pounds, an amount insufficient to even pay switching absorptions.

As suggested by Commissioner Eastman in his dissent to the second report of the Commission (R. 49, 50), the remedy for the circuity said by the Commission to exist, lies in the cancellation of rates and routes via Peoria, a matter not involved in this proceeding and which the Commission has sought to produce only by indirection. Certainly, so long as the joint rates from Peoria-Pekin are maintained as they now exist and appellant participates in them over direct routes, appellant's right to a fair share of the total revenue received cannot be denied on the ground of circuity.

The Commission's idea of a noncircuitous movement

is apparently represented by its statement (R. 48) that appellant should move the traffic from Peoria-Pekin to the east via Ashland and Springfield, Illinois. This could be done, of course, but it would substantialy lengthen the haul from Peoria-Pekin to Buffalo and New England points. As appears from Exhibit 14 before the Commission (R. 89), Ashland and Springfield are south and west of Peoria-Pekin. The Commission's suggestion, therefore, is that present circuity of route be avoided by starting a shipment in a direction opposite to that in which it should go to reach its ultimate destination.

F. *Since the Commission's order with respect to the divisions of the "reshipping" rates went beyond the issues, was unsupported by evidence, exceeded constitutional limits and was unreasonable and arbitrary, it will be enjoined.*

From a reading of its second report, it is obvious that the Commission, in deciding this case on rehearing, did not confine itself to the issues presented to it. One issue was the propriety of the divisions of the joint "reshipping" rates from Peoria-Pekin to the east published by appellant and the Railroad Defendants. In dealing with this issue, the Commission considered the application of different rates to Peoria-Pekin and Chicago from western points; transit at Peoria-Pekin; routes from western territory via Peoria-Pekin and Chicago to eastern destinations and a variety of other matters having nothing to do with divisions. Certainly, it did not confine itself to the determination of proper divisions of the joint rates involved, after a consideration of the matters enumerated in Section 15 (6) of the Act.

When this case was called for hearing before the Commission, no one could have presumed that the Commission intended to consider questions of rate application,

routes and transit. No evidence was presented on these matters except statements of the existing situation. Numerous parties who might conceivably have an interest in such issues were not parties to the proceeding and were not heard. It is also obvious that the Commission's conclusion with respect to the divisions of the "reshipping" rates was unsupported by evidence and was unreasonable and arbitrary.

Under these circumstances, its order in that respect must be condemned upon the merits. It is elementary that a hearing must be limited to the issue formed by the pleadings. *Oregon R. R. & N. Co.* v. *Fairchild,* 224 U. S. 510, 525, 526; *Southern Pacific Co.* v. *Bartine,* 1 Fed. (2d), 323, 324, 325. It is also certain that an order made without a hearing, unsupported by evidence, and which exceeds constitutional limits and is unreasonable and arbitrary will be enjoined. *Manufacturers Railway Co.* v. *United States, supra,* p. 481; *Assigned Car Cases,* 274 U. S. 564; *Virginian Ry. Co.* v. *United States,* 272 U. S. 658; *Western Chemical Co.* v. *United States,* 271 U. S. 268; *United States* v. *New River Co., supra; B. S. L. & W. R. Co.* v. *United States, supra; United States* v. *B. & O. R. R. Co.,* 225 U. S. 306.

Conclusion.

Under the foregoing, we submit that the order of the Commission assailed in this case, in so far as it approves and authorizes the application of the present divisions of the joint "reshipping" rates here involved, should have been set aside and that the Railroad Defendants should have been enjoined from enforcing those divisions against appellant. As we have said, we have been unable to find anything in the decisions of this court which supports the theory that the court does not have

jurisdiction because of the alleged "negative" form of the Commission's order. Not only does it seem to us that this theory fails of support in the decisions of this court, but that this must be so under every consideration of justice and equity.

It is inconceivable that a conceded violation of statutory and constitutional rights can be inaugurated and remain in effect merely because of the form of words in which it is couched. Yet that is the effect produced by the decision of the lower court. Appellant, under the conditions produced by the Commission's order and continued by the lower court, may only avoid a violation of its rights by withdrawing from the traffic. It is thus compelled to preserve one right by foregoing another. We submit that such a conclusion is not supported by any decision of this court.

And on the merits it is equally plain that appellant is entitled to the relief prayed for by it. The Commission's order, in so far as it is complained of, is arbitrary and unreasonable on its face. It is not based upon any evidence of record. In entering it, the Commission refused to comply with the law as construed by this court. It went beyond its jurisdiction by basing its decision upon a consideration of matters not in issue and concerning which there had been no hearing and no evidence. Under these circumstances its order, so far as the merits are concerned, is necessarily bad.

We submit that the decision of the lower court should be reversed.

Respectfully submitted,

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